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In the

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Respondent,

v.

A & D DAVENPORT TRANSPORTATION, INC., and SUN-FAIR SPECIAL SERVICE TRANSPORTATION, A DIVISION OF A & D DAVENPORT TRANSPORTATION, INC.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION FOR REVIEW

WHETHER THE DRIVERS ENGAGED IN A CONCERTED WORK STOPPAGE WHICH WAS UNPROTECTED BY REASON OF SECTION 8(g) OF THE NATIONAL LABOR RELATIONS ACT

PARTIES

The parties are specified in the caption. Petitioners A & D DAVENPORT TRANSPORTATION, INC., and SUN-FAIR SPECIAL SERVICE TRANSPORTATION, INC., are hereinafter collectively referred to as "Davenport". Respondent NATIONAL LABOR RELATIONS BOARD shall hereinafter be referred to as "Board".

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OPINIONS BELOW

The "Order" of the United States Court of Appeals for the Seventh Circuit was unpublished but is reported in a table at 668 F.2d 844 (7th Cir. 1982). (A copy of the order is attached

hereto in the Appendix at A-1). The "Decision and Order" of the Board is reported at 256 NLRB No. 79 (1981) and is attached hereto in the Appendix at A-30. The "Decision" of the Board's Administrative Law Judge, Harold Bernard, Jr., is not reported and is attached hereto in the Appendix at A-35.

JURISDICTIONAL SUMMARY

The Order was filed on August 30, 1982 (A1). Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Sec. 1254. The jurisdiction of the appellate court was invoked pursuant to the National Labor Relations Act, as amended (29 U.S.C. Sections 151, et seq.), Rule 81 (a) (5) of the Federal Rules of Civil Procedure, and Rules 15-20 of the Federal Rules of Appellate Procedure.

PERTINENT STATUTES

29 U.S.C. 152(5):

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or

plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. 152(14):

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons.

29 U.S.C. 158(A)(1) (in pertinent part):

(a) It shall be an unfair labor practice for an employer--(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS Sec. 157].

29 U.S.C. 158(g) (in pertinent part):

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the instituion in writing and the Federal Mediation and Conciliation Service of that intention. . . .The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

STATEMENT OF THE CASE

Davenport was engaged in the "transportation of handicapped, non-ambulatory, or

medically-infirmed persons to and from treatment centers and their residences . . ." (Decision of Administrative Law Judge Harold Bernard, Jr., hereinafter "Decision", at Appendix, A-36). The company provided this transportation to public aid recipients and received funds from the State of Illinois. The rates were part of a public aid appropriation passed by the General Assembly of the State of Illinois. The corporation grossed over $400,000 in 1978 but incurred a net loss of $55,000 for said year.

On April 3, 1979, Davenport employed fourteen medi-car drivers, eleven of whom were assigned to work that day. The medi-cars were converted buses, equipped with two-way radios and manned by two driver-helpers. They picked up medically ill patients at home, helped the patients into the medi-cars, transported them to hospitals and other treatment facilities, and then returned the patients home.

Roy Montgomery had been employed by Davenport for approximately 15 years; he was the

general manager and corporate secretary for 9 years. He was a supervisor within the meaning of the Act. He has periodically been in contact with Mr. Eugene Julian, supervisor of the medicar division of public aid, attempting to increase the dollar amount the State of Illinois paid for Davenport's service.

Davenport's drivers had held regular meetings "every week . . . after we got off work on Tuesday." At these meeting the drivers would "talk to each other about what we were going to do . . . [a]bout working conditions and how we were going to ask Roy [Montgomery] about if he was going to give them to us." At least six meetings were held between the drivers and Davenport's management regarding working conditions.

On Saturday, March 31, 1979, beginning between 1:00 and 1:30 p.m., four of Davenport's drivers, Messrs. Richard Warfield, Henry Davis, William Butler, and Bobbie Bracy, met at the home of Mr. Warfield and selected Mr. Warfield as their spokesman to negotiate insurance,

hospitalization, a raise, and shorter working hours with Davenport.

Warfield arrived at Davenport's yard between 5:00 a.m. and 7:00 a.m. on April 3, 1979. Shortly thereafter, Mongomery came in. Warfield went to see Montgomery at about 7:00 a.m. Warfield requested an increase in pay, insurance, hospitalization, and a lunch hour. Montgomery showed Warfield documentation to prove he was unable to offer the drivers more than they were already getting. Montgomery told Warfield that the company was operating in the red, and when public aid gave the firm an increase, the drivers would get a raise.

After his meeting with Montgomery, Mr. Warfield held discussions with other Davenport employees, including Mr. Louis Larkins, Mr. Wardell Madison, Mr. Michael Taylor, Mr. Henry Davis, and Mr. Nixon Goldsby, regarding his negotiations.

At 11:30 a.m. on April 3, 1979, Warfield called to all drivers over their radios to

"return to base", thereby creating a disruption in Davenport's services. Warfield made the call anonymously and had no company authority to issue this directive. All the drivers obeyed Warfield's instruction and returned to Davenport's yard. A meeting then ensued between the drivers and Montgomery.

Driver Nixon Goldsby assisted in the work stoppage because of his fear of personal harm, afraid that "something could happen". In his affidavit, Goldsby stated that Warfield had called him on April 2, 1979, stating "he was going to ask Montgomery for a raise and if we didn't get it we were going on strike and he'd call us back to base. He said he'd call us on the box (radio). I said what if we didn't want to go on strike and he said anybody who doesn't agree, he'd whoop his ass."

One patient, Nathaniel White, was in one of the medi-cars at the time Warfield made the call, and (unbeknownst to management) was brought to the base when the driver obeyed Warfield's order. Mr. White remained in the

medi-car in Davenport's yard throughout the meeting until his presence was discovered at the end of the meeting. The delay caused Mr. White to miss his medical appointment.

During the meeting, Montgomery received telephone calls from Mr. Timothy Snyder of the Illinois Department of Public Aid, which, by reason of the disruption of medical services, notified Montgomery that it was discontinuing giving service requests to Davenport for the two weeks between April 3 and April 16, 1979, thereby forcing Davenport to substantially close its operations.

Warfield started the meeting by telling Montgomery the drivers needed hospitalization insurance, a lunch hour, and a raise. Montgomery repeated that public aid was six years behind and that there was nothing he could do to get any more money for the men. The work-related issues which Montgomery and Warfield had discussed that morning were again covered during the meeting.

Montgomery testified that Warfield stated, "[i]f we could not get [a raise and insurance], then we will have to go, see." One of the drivers, Armstrong, heard Warfield say that "if [Montgomery] cannot guarantee the raise, there was one thing left for them to do, and that was walk out the gate." Another employee, Ann Rasberry, confirmed this as well, adding that Montgomery had stated he wanted to call the Public Aid office to tell them of the stoppage. Warfield insisted Montgomery could not have anyone else to do the job of drivers, and that no vehicles were going out. Dorothy Davenport also heard Warfield state no vehicles would go out that day.

Montgomery drafted a statement of position for the drivers to decide whether they would or would not work under the existing conditions. "I made this out at the spur of the moment after it was clear that they were not going to go back to work." The statement was distributed, first to Warfield, for the signatures of the drivers. Montgomery then said, "Listen, now all those who

want to work, sign this sheet above so I know whether you want to go back to work or not."

Montgomery testified that he wanted to know who wanted to work, "[b]ecause I had people to be picked up. Then I could give Mr. Snyder a decision on what I was going to do or whoever else was out there." He chose the wording of the statement because "[i]t was the only thing I could think of. It was the simplest things for me to write, to know whether they wanted to work with the same way they are working before they came into the office. . . .I selected those words because the fellows were here for an increase in pay and if these fellows would go back to work, it would be under the same things as we had before, same pay as it was before they walked into the office." The statement "did not determine them being discharged or whatever you want to say, they walked out, they quit that particular time." Montgomery reached this conclusion because "it was obvious to me that Mr. Warfield, after he stated that they were going

to go out, no wheels were going to go off the base without me, myself, or Mrs. Davenport to drive them it was obvious they were not going to work.

The statement was distributed. Madison then asked what it meant by their signing it, were they fired. Montgomery responded to the effect that he did not know, and a decision had to be made.

When the statement reached driver Willie Williams, he asked if Montgomery could guarantee a raise on July 1, 1979. Receiving a negative reply, he "scratched his name out because he wanted to work, he did not want to walk out." Williams agreed this was his reasoning. This exchange was heard by the dispatcher Jones and driver Armstrong.

At the conclusion of the April 3 meeting, seven drivers (Richard Warfield, William Butler, Louis Larkin, Bobby Brach, Wardell Madison, Henry Davis, and Michael Taylor) "physically walked out". The seven then left Davenport's yard and went to the police station. The police

referred them to the National Labor Relations Board.

That afternoon, the remaining drivers and Montgomery completed the uncanceled deliveries. However, approximately twenty of the transportation appointments had been canceled.

ARGUMENT IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI

"Special and exceptional reasons" exist which warrant this Court's review. Specifically, the construction and effect of Section 8(g) of the National Labor Relations Act are in issue. Davenport, a health care institution, was closed down by a strike, and the closure severely disrupted health care services, to the patients' detriment. The strike occurred without any notice, in direct contravention of Section 8(g), yet both the Seventh Circuit and the Board have found the drivers to be protected by the Act. The reasoning of these decisions if not reversed, limits the effect of Section 8(g) and will allow

employees of small health care institutions to strike without warning. Congress sough to avoid such a result when it enacted Section 8(g). Accordingly, this Court should grant this petition to vindicate the rights of patients and the intent of Congress.

Davenport respectfully submits that the drivers' work stoppage on April 3, 1979, without advance notice was not protected under Section 8(a)(1) of the National Labor Relations Act ("Act") because the drivers violated Section 8(g) of the Act. 29 U.S.C. Secs. 158(a)(1) and 158(g). Davenport is engaged in the business of "essential medical-patient services" (Decision at 2; Appendix, A-36). The patients transported by Davenport were handicapped, non-ambulatory, or medically infirm. Many had specifically scheduled appointments for medical treatment at hospitals. The drivers' work stoppage emperiled the health of the patients who depended upon Davenport for transportation to medical facilities.

Section 8(d) of the Act provides that an employee who fails to provide proper notice before engaging in "any strike within the appropriate period specified in subsection (g) of the section shall lose his status as an employee engaged in the particular labor dispute. . . ." 29 U.S.C. Sec. 158(d). Davenport's drivers stopped work without any notice whatsoever, violating Section 8(g) and losing protection under Section 8(a)(1).

A. The Drivers Engaged in a Strike.

The Seventh Circuit did not decide whether Davenport was a health care institution or whether the drivers were organized into a labor organization. That Court based its decision on the conclusion that the drivers "were not engaged in a concerted refusal to work" (Order at 9; Appendix, A-24-26). Although the Board came to the same conclusion (Decision and Order at 3, n. 2; Appendix, A-34), the Administrative Law Judge significantly and determinatively found that the drivers "were

withholding their services from Respondent in order to secure improvements in their working conditions in the form of better wages, i.e., that they were engaging in a strike . . ." (Decision at 5, line 42, Appendix, A-41).

The petitioners respectfully submit that the record clearly establishes that the drivers unquestionably stopped work as a concerted activity in obedience to Warfield's instruction (Decision at 2, Lines 12-13, at 5, lines 21-22, 42; Appendix, A-36, 41). The basis for the Seventh Circuit's Order, i.e., that the drivers were not engaged in a concerted refusal to work, is contrary to the facts and was never argued before that court by either party.

The Seventh Circuit apparently reached this conclusion because Montgomery did not countermand Warfield's instruction that the drivers "return to base" (Order at 9; Appendix, A-25). It is undisputed, however, that Warfield, the drivers' representative, directed that the drivers cease work and return to base. The

drivers returned to Davenport's yard "around noon in response to a call over their radios to '. . . return to base', an unusual call given its timing in mid-day when the record shows that there were many deliveries or transporting of patients yet to be completed" (Decision at 2; Appendix, A-36). This constituted a strike! Moreover, Montgomery did not know that a patient was still in one of the medi-cars when the drivers struck. The nature of the drivers' strike was not altered simply because Montgomery was polite to them upon their return to the base. Indeed, if the drivers' activity had been protected by the Act, Montgomery may have engaged in an unfair labor practice by attempting to counter the order.

Montgomery distributed the statement in an effort to discover which employees " . . . want to work under the present working conditions" (Decision at 3; Appendix, A-38). Those who did not were clearly engaged in a "concerted refusal to work". Accordingly, it is respectfully submitted that the Seventh Circuit's finding

that the drivers were not so engaged was against the manifest weight of, unsupported by, and directly contrary to the evidence and record.

B. Davenport Is a Health Care Institution.

Subsection 2(14) of the Act defines a "health care institution" as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirm or aged persons." 29 U.S.C. Sec. 152(14). The Congressional intent was "to minimize disruption of patient care services." North Suburban Blood Center v. National Labor Relations Board, 661 F. 2d 632, 634 (7th Cir. 1981). The drivers' work stoppage in the instant application severely disrupted patient services. As the Seventh Circuit stated in North Suburban Blood Center, supra, at 634-35: The crucial factor in the definition of health care institutions is patient welfare. . . ." In the instant application, Mr. Nathaniel

White was being transported for medical treatment when the drivers' stoppage forced him to miss his appointment and instead remain in the back of a medi-car in Davenport's yard for a substantial period of time. Approximately twenty appointments were canceled because of the work stoppage.

The Board did not deny that Davenport is a health care facility (Appendix, A-34, n. 2). The Board instead sidestepped the issue by finding that the drivers were not a labor organization as defined in Subsection 2(5). 29 U.S.C. 152(5). See Argument C, infra.

The sponsoring Representatives of Section 8(g), Thompson and Ashbrook, in the House of Representatives, described health care institutions as those which provided "real patient care and health service delivery, whether inpatient or outpatient." 120 Cong. Rec. 16905 (May 30, 1974) (emphasis supplied). The clear and unequivocal goal of Section 8(g) is to prevent the sudden and unforewarned disruption of health

care, which disruption could occur without subsection (g). North Suburban Blood Center, supra; S. REP. NO. 93-766, 93rd Cong., 2nd Sess. (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3948.

The Board has previously ruled that "health care institutions" do not include medical testing laboratories, Boston Medical Laboratory, Inc., 235 NLRB No. 170 (1978); Goodwill Industries, Abilities and Goodwill, Inc., 226 NLRB No. 191 (1976), and medical centers testing human specimens, Center for Laboratory Medicine, 234 NLRB No. 56 (1978). The Board has ruled that non-profit facilities for the treatment of emotionally disturbed adolescents, Trailback, Inc., 221 NLRB No. 107 (1975), homes for the mentally retarded, Beverly Farm Foundation, 218 NLRB No. 194 (1975), half-way houses for the mentally ill, Baker Places, Inc., 219 NLRB No. 16 (1975), and non-profit corporations providing education services and treatment to mentally retarded, handicapped, developmentally disabled, or learning disabled children and adults, Woods

Schools, 219 NLRB No. 31 (1975), are all "health care institutions".

Davenport is a health care institution. The company, and particularly the Sun-Fair division, is engaged in providing transportation at specific times for patients to and from hospitals. The Administrative Law Judge repeatedly referred to Davenport's business as delivering patients and described the work stoppage as "a severe disruption in essential medical-patient services . . ." (Decision at 2; Appendix, A-36; emphasis supplied). In fact, when the drivers returned to base on April 3, one had a patient in the medi-car at the time and the drivers did not disclose this fact to the company until the end of the meeting!

The plain wording of Section 8(g), the expressed intentions of Section 8(g)'s legislative sponsors, the overwhelmingly patient-care oriented nature of Davenport, and the actual harm to patient care caused by the work stoppage compel the conclusion that

Davenport is a health care institution.

C. The Drivers Constituted a Labor Organization.

A labor organization is defined by section 2(5) of the Act as meaning "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" (emphasis supplied). 29 U.S.C. Sec. 152(5). The drivers were organized into a committee; they conducted regular meetings; they were represented by an agent (Warfield) who bargained with Davenport; and they obeyed their representative's call to stop work. The drivers were clearly acting as a labor organization within the meaning of the Act.

The Board's order found, directly contradicting the findings of its Administrative

Law Judge, that the drivers were "totally unstructured" and thus "not a statutorily defined labor organization" (Appendix, A-34, n. 2). The Administrative Law Judge, however, found that the drivers were "beyond question . . . engaging in concerted activity . . ." (Decision at 5; Appendix, A-41). The Administrative Law Judge found that there were numerous prior contacts between the drivers and Montgomery," that "Respondent's eleven medi-car drivers returned to base around noon in response to a call," and that driver Warfield made the call (Decision at 2; Appendix, A-36). Moreover, Warfield was acting as the "spokesman" of the drivers (Decision at 3; Appendix, A-37).

The drivers' concerted activity was clearly undertaken as an "agency" or "committee". 29 U.S.C. Sec. 152(5). The section does not require affiliation "with any existing labor organization" or a formal structure (Appendix, A-34, n. 2).

D. The Drivers' Work Stoppage Was Not a Protected Concerted Activity Because a Ten-Day Advance Notice was Not Provided.

The April 3, 1979, work stoppage violated Section 8(g) because it was committed by a labor organization against a health care institution without any notice at all, much less the required ten days. Significantly and determinatively, in International Union of Operating Engineers, Local No. 948 and Osteopathic Hospital Founders Association, 238 NLRB No. 158 (1978), the Board ruled that a union representing stationary engineers who ceased working in protest of a job assignment dispute at a health care institution without giving ten days' notice was engaged in an unlawful work stoppage.

The drivers' work stoppage herein caused the very harm which Congress sought to prevent by enacting Section 8(g). Davenport's services were suddenly unavailable to the patients and Public Aid, resulting in disrupted patient care for the ill, aged, and infirm. The poor were

particularly victimized since they are the beneficiaries of this Public Aid program. Individual patients were harmed by the abrupt nature of the work stoppage, including Nathaniel White, who became a virtual prisoner throughout the negotiations. Mediation or conciliation, specifically provided for by Section 8(g), was precluded. The Board has improperly asserted that this was a "protected" activity. Davenport respectfully contends that this was an unprotected activity.

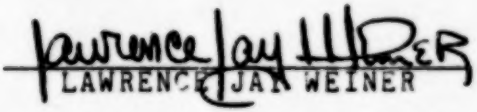
CONCLUSION

The Board presents the courts with a legal incongruity. The Board's position, enforced by the Seventh Circuit, allows employees to receive the benefits of the Act without performing their corresponding duties to give notice prior to the work stoppage and to mediate the dispute. The sudden work stoppage could have been prevented or its harmful effects eliminated if the notice had been given.

The reasoning of the Board and the United States Court of Appeals for the Seventh Circuit vitiates the Congressional intent in enacting Section 8(g) of the Act. This Court should grant this petition for a writ of certiorari to protect the health and safety of patients from sudden disruptions in essential health care services.

WHEREFORE, the petitioners respectfully pray that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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